Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

In the Matter of the Termination of the Parental Rights of WARREN R. FOLLUM JR.,

Petitioner,

v.

JOYCE ANN FOLLUM a.k.a JOYCE ANN VIOLANTE

Respondent.

On Petition For Writ Of Certiorari to the Court of Appeals State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The relationship between petitioner and his children is Constitutionally protected, *see Troxel vs. Granville, 530 U.S. 57.* A biological parent has a right to the care and custody of his children, even though the State may be able to determine a arrangement which the State may believe better serves the children's long term needs. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law". This Court has long recognized that the Fourteenth Amendment's "Due Process Clause" like its Fifth Amendment counterpart guarantees more than fair process. The clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. The fundamental right, and liberty interest at issue in this matter is petitioner's interest in the companionship, care, nurturing, and upbringing of his children. This is the oldest of the fundamental rights, and liberty interests recognized by this Court and the Court of Appeals for the State of New York.

A. Whether, the Fourteenth Amendment Due Process and Equal Protection Clauses guarantees petitioner and his children, who are the subjects of the litigation, to Notice and a Due Process Hearing prior to the State terminating petitioner's parental rights to his minor children, and seizing his property for the benefit of respondent?

B. Whether , the State was required to provide petitioner, who was and is indigent, with assigned compensated counsel, on any substantial infringement of his parental rights to his minor children, under Family Court Act § 262 (subd. (a), par.(V))?

C. Whether, the Sate must use diligent efforts to strengthen the relationship between petitioner and his children, and work with petitioner to regain the established and beneficial relationship between petitioner and his children, under NY Social Services Law § 384-a[2][c][iv], prior to the State terminating petitioner's parental rights to his minor children?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption. The litigation concerns the termination of the petitioner's parental rights with his minor children Aaron Jacob (Follum) Violante and Marie Alyssa (Follum) Violante.

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OPINIONS BELOW

The 11 May, 2006 order of the Court of Appeals of the State of New York in Motion No. 533 SSD 41 refusing to allow further appellate review of Appellate Court's affirmation of the Supreme Court, State of New York, County of Monroe, decision, which is reported at 2006 N.Y. Lexis 1360, see page APP-1. This petition for Writ of Certiorari is filed within ninety (90) days from that date, Supreme Court Rule 13. The 22 February 2006, order of the Supreme Court Appellate Division Fourth Judicial Department, in Case No. CA - 05 - 00056 and CA - 05 - 01785, and Supreme Court, State of New York, County of Monroe, Index No. CA - 04 - 04103, refusing to vacate its original order dated 13 September 2005, is not official reported, see pages APP-2. The 20 December 2005, order of the Court of Appeals of the State of New York in Motion No. 1270 SSD 71 refusing to allow further appellate review of Appellate Court's affirmation of the Supreme Court, State of New York, County of Monroe, decision, which is reported at 2005 N.Y. Lexis 3424, see page APP-4. The 13 September 2005, order of the Supreme Court Appellate Division Fourth Judicial Department, in Case No. CA - 05 - 00056 and CA - 05 - 01785 is not official reported, see pages APP-5. The Trial Court's Decision and Order of the Supreme Court of the State of New York, County of Monroe, Index No. 01 - 014496, dated 28 October 2004, and 6 April 2005, is not official reported, see pages APP-7.

BASIS FOR JURISDICTION IN THIS COURT

The opinion of the Court of Appeals State of New York was issued on 11 May, 2006. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257.

CONSITUTIONAL AND STAUTORY PROVISION

The petitioner brought this application to the Court, because of the uniqueness of the facts and circumstances of this case, and it creates issues of law that have overriding national importance to parents who proceed pro se in a parental termination action, on

whether they will be afforded their fundamental and substantial Constitutional and Statutory Rights to Notice and a Due Process Hearing on the issue of terminating petitioner's parental rights; and an indigent parent's Statutory rights under New York's Family Court Act (FCA) to assigned compensated counsel on any substantial infringement of petitioner's rights to his children; and a litigants right of equitable division of the matrimonial property under the Domestic Relation Law (DRL) Equitable Distribution Law. Because the above rights are statutory they are guaranteed under the Fourteenth Amendment to the United States Constitution; and New York's Civil Practice Laws and Rules (CPLR), the FCA, and DRL, whether the litigant is pro se or represented by counsel. Pro se litigants and their children can not be afforded a fair and impartial trial, when the New York courts are biased against pro se litigants, and they are willing to turn the Fourteenth Amendment, CPLR, FCA, and DRL, on their heads to advance their own agenda.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens, of the United States and of the State wherein they reside or where the lower court's proceedings were held. These citizens include both pro se litigants involved in a divorce and parental termination proceeding under NYDRL and FCA and the children who are the real subjects to these proceedings. No State shall make or enforce or interrupt any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State unfairly or arbitrarily deprive any person of life, liberty or property, without Due Process of Law; nor arbitrarily deny to any of its citizens within its jurisdiction the Equal Protection of the Laws. Once the State provides a statutory right for to full evidentiary hearing, and notice of that hearing; and assignment of compensated counsel to indigent parents faced with any substantial infringement of their parental rights in any civil action; and the equitable division of matrimonial property under CPLR, FCA, and DRL, the State can not "bolt the door shut to equal justice", see Griffin v. Illinois, 351 U.S. 12. When the State does block a litigant's, such as petitioner's, substantial and fundamental Constitutional and Statutory rights to a full and fair opportunity to be heard, prior to the

State terminating petitioner's parental rights; and deprive petitioner of his property, the State is violating the petitioner's due process, and equal protection of the law rights under the Fourteenth Amendment.

Petitioner was denied any opportunity to dispute the termination of his parental rights as imposed upon him by the proceedings conducted within the New York courts. In effect and as a practical matter, petitioner, was prevented by the framework of the State court's proceedings and decisions from a full and fair opportunity to defend and prosecute his Constitutional Right to the care, nurturing, upbringing , and companionship of his minor children; and whether the termination of petitioner's parental rights would be in the children's best interests, under the total facts and circumstances of this matter. The New York trial court blocked all of petitioner's clear Constitutional and Statutory rights to Notice and a Due Process Hearing. Petitioner and the children were denied their procedural due process rights by the New York courts when the trial court terminated petitioner's parental rights without affording the petitioner Notice of the Hearing, and holding a Due Process Hearing regarding the petitioner's substantial and fundamental constitutional rights to his children, and what is in the best interests of the children. This Court has decided in numerous decision that procedural due process is absolute, because of the importance to organized and civilized society that procedural due process be observed. The lack of "Due Process" invalidates the findings of the New York trial court in this matter, in regards to the termination of petitioner's parental rights, the division of the marital property, and what is in the minor children's best interests, see Carey v Piphus, 435 U.S. 247; Hughes v. Rowe, 449 U.S. 5; Stanley v. Illinois 405 U.S. 645; Matter of Lawrence 29 NY.2d 206; N.Y. v. Witenski 15 NY.2d 392; the Fourteenth Amendment of the Constitution of the United State; the New York Constitution, Article I §§ 6 and 11; Troxel v Granville, 530 U.S. 57; Bellotti v. Baird, 443 U.S. 622; Lassiter v D.S.S. Durham County, NC, 452 US 18; Matter of JoAnne Bennett 40 NY.2d 543; Matter of Ella B. 30 NY.2d 352; Von Moltke v Gillies, 332 US 708, 724;

Goldberg v Kelly, 397 US 254; Santosky v Kramer, 455 U.S. 745.

A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner, see Lehr v. Robertson, 463 US 248, 268, quoting Mathews v. Eldridge, 424 US 319, 333; Armstrong v. Manzo, 380 US 545, 552. Because of the State courts' regime of denying petitioner access to the courts, petitioner was precluded from the very outset from introducing any evidence, which would support and validate his assertion that the termination of petitioner's parental rights would not be in the children's best interests. Therefore, petitioner, and the children have never been afforded any real opportunity in State court to prosecute and defend this matter in any meaningful manner, and thus has been denied due process and equal protection of the law.

Substantive due process comes not from drawing arbitrary lines, but rather from careful "respect for the teachings of history and solid recognition of the basic values that underlie our society, see Griswold v. Connecticut, 381 US 479; generally Ingraham v. Wright, 430 US 651; Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123; Lochner v. New York 198 US 45. Our society has a tradition for the bonds uniting the members of the nuclear family, which have roots that are constitutional protected. Even if conditions of modern society have brought about a decline in the nuclear family, they have not erased the accumulated wisdom civilization has gained over the centuries and honored throughout our history, that supports the conception of a nuclear family that includes the father, and his children. Either out of choice , necessary, or sense of family responsibility the nuclear family participates in its duties and the satisfaction of the whole family. Especially in times of adversity , such as divorce or economic need, the nuclear family has tended to maintain or rebuild a safe and secure environment for the children. Petitioner's petition, like other parent's petitions, rest on an Constitutional assertion of a fundamental and substantial parental right to the care,

nurturing, upbringing, and companionship of his children, along with a combination of the best interests of the children; and family interests that is founded in our paramount interest in a child's welfare and our traditional recognition of the nuclear family. The petitioner's rights as a parent can not be terminated without clear and convincing cause, and without first holding a Due Process Hearing. The Court, assumes as it must, that the established parent - child relationship is in the best interest of the children. When the State terminated petitioner's rights to his children, the State worked a unique kind of deprivation and the petitioner's interest in the accuracy and justice in the decision to terminate petitioner's parental rights to his children is a commanding one, see May v Anderson, 345 US 528; Armstrong, supra. Thus when respondent subsequently seeks to terminate the petitioner's relationship with his children, the State must hold a Due Process Hearing to determine whether there is clear and convincing cause for such a drastic action, and must make inquires into whether any prior agreement was voluntarily made, see Matter of Michael B., 80 NY.2d 299; Matter of Jacob, 86 NY.2d 651.

A biological parent , such as petitioner, has a fundamental right to the care and custody of his children, even though the State may be able to determine a arrangement which the lower court may believe better serves the children's long term needs. The fundamental statutory emphasis is that the biological parent , such as petitioner, continued relationship with his children best serves the children's long-range needs, see Smith v Organization of Foster Families, 431 US 816. Thus, the State can not terminate petitioner's rights to his children without clear and convincing evidence that such a drastic step is warranted, and must make inquires into whether any prior agreement was voluntarily made, see Michael B., supra; NY Social Services Law (hereafter NYSSL) § 384-b[3][g];[4].

The NY Legislature has found and declared that a child's need to grow up with his or her parent, such as petitioner, is ordinarily in the child's best interest, see NY SSL

§ 384-b[1][a][iii]. The State's first obligation in a termination proceeding, when a parent is in temporary crisis, is to help petitioner with services to prevent the break-up of petitioner's relationship with his children, and to reunite petitioner with his children, see NY SSL § 384-b[1][a][iii]; Santosky v Kramer, 455 U.S. 745; Michael B., supra. Also, the Sate must use diligent efforts to strengthen the relationship between petitioner and his children, and work with petitioner to regain the established and beneficial relationship between petitioner and his children, see NY SSL § 384-a[2][c][iv]; Matter of Sheila G., 61 NY.2d 368. The courts below did not sufficiently examine the qualifications and backgrounds of the parties involved in this matter. Nor did the trial court make any attempts to strengthen the long term established and beneficial relationship between petitioner and his children . The lack of the lower court to adequately exame the parties and seek services to help strengthen petitioner's existing relationship with his children prior to terminating petitioner's parental rights, the decree terminating petitioner's parental rights would be vacated, see Matter of Joanne Bennett, supra.

The priority which is accorded the lower court's first award of custody, whether contained in court order or voluntary agreement, results not from the policy considerations involved in res judicatia, but whether change in the decree is warranted by the circumstances, see Friederwiter v Frienderwitzer, 55 NY.2d 89; Matter of Bachman, 1 NY.2d 575; Goldman v Goldman, 282 NY 296. The weight to be given the prior award necessarily depends on whether the lower court trial judge considered all relevant, and material evidence during the plenary hearing or, as in this matter, where no hearing was held to determine whether respondent's allegations supports the trial court's harsh and drastic action of terminating petitioner's parental rights. No such prior agreement or decree can stand and bind this Court to a disposition in which the lower court did not weigh all of the factors involved to conclude that the termination of petitioner's parental rights would be in his children's best interests, see Frienderwitzer, supra.

The above combination of interests gives this Court a compelling reason to vacate the lower court's action of terminating petitioner's parental rights, which interferes with the established beneficial relationship between petitioner and his minor children.

STATEMENT OF THE CASE

The petitioner brought this application to the Court, because of the uniqueness of the facts and circumstances of this case, and it creates issues of law that have overriding national importance to parents, such as petitioner, who proceeds pro se in seeking to have the lower courts vacate a wrongful termination of his parental rights with his children , and to the children themselves, on whether they will be afforded their fundamental and constitutional rights to a fair hearing and the constitutional guarantees under the Fourteenth Amendment to the United States Constitution; and New York's Civil Practice Laws and Rules (CPLR), the Family Court Act (FCA), and Domestic Relation Laws (DRL), which are afforded to litigants who are represented by counsel. Pro se litigants and their children can not be afforded a fair trial, when the New York Courts are biased against pro se litigants, and they are willing to turn the Fourteenth Amendment CPLR, FCA, and DRL, on their heads, to advance their own agenda.

REASONS FOR GRANTING THE WRIT

I. This Court has Jurisdiction Over This Matter pursuant to 28 USC 1257.

The 11 May, 2006 order of the lower court refusing to allow further appellate review of the trial court orders has in all practical sense effectively ended the litigation for petitioner. And from the lower court's dismissal, petitioner has and will continue to suffer significant irreparable injury by being denied his substantial and fundamental constitutional right to the care, upbringing, nurturing, and companionship of his children. Petitioner has no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit to vacate the lower court 's order

which terminated his parental rights is his only means of securing adequate relief.

The label that a lower court attaches to an order it issues does not control the question of whether this Court considers the order a final decision. Rather, the Court must determine whether a lower court's order ends the litigation, see Catlin v Untied States, 324 U.S. 229. The trial court in the instant matter tried the controversy on the merits, and two decrees dated 28 October 2004, and 6 April 2005, were entered. The trial court's order, recites the filing of a decision, opinion, and it is ordered, adjudged and decreed that all of petitioner's claims be dismissed on the merits. Then the New York appellate courts dismissed petitioner's appeals refusing to allow further appellate review of the trial court orders. Clearly the actions of the lower courts ended the litigation and the appeal lies to this Court under 28 USCS 1257.

Petitioner's dispute, and controversy lays in a catch 22 legal quagmire. Petitioner can not return to the New York State courts to settle the controversy on whether the lower trial court denied him due process and equal protection of law under the Fourteenth Amendment when the State terminated his parental rights to his minor children, without notice and holding a due process hearing. Because of the loss of petitioner's parental rights by the State's actions, petitioner has and continues to suffer irreparable injury which cannot be recovered if this Court was to reverse the lower court's orders, and remand the matter to the New York courts for further proceedings. The determination by a state court which otherwise might be regarded as non-final may be deemed final for the purposes of review by this Court where the controversy has proceeded to a point where the losing party would be irreparable injured if review were unavailing, see Catlin , supra; Clark v Williard, 294 U.S. 211; Gumbel v Pitkin, 113 U.S. 545. Thus, the Court has jurisdiction to review the lower court's orders, because the lower court's dismissal of petitioner's cause of action for all practical purposes put an end to the controversy, and petitioner has

and will continue to suffer irreparable harm if the Court's review were unavailing.

II. The Decision below is in Fundamental Conflict with the Decisions of this Court Recognizing that all Litigants are Entitled to Due Process and Equal Protection Under the Law when the State Terminates a Parent's Parental Rights; and Divides the Marital Property of the Parents; and the State did not provide Petitioner, who was and is Indigent, Compensated Assigned Counsel on any Substantial Infringement of his Parental Rights During any Civil Proceeding.

As the Court knows, pro se litigants create unique problems for the courts. In recognition of this uniqueness the courts are obligated to construe pro se pleadings and papers liberally. It is well settled law, that the legal papers and arguments of a pro se litigant, however in-artfully pleaded and / or presented are held to less stringent standards than formal pleadings and arguments presented by attorneys, *see Haines v Kerner, 404 US 519.* And their is a greater burden on the lower courts to ensure that the proceedings are fair, and that the statutes are adhered to , and that justice is done. Pro se papers and pleadings are not to be dismissed, unless it appears beyond all doubt that the pro se litigant can show no set of facts in support of his claims which would entitle him to relief.

As will be shown below, petitioner was denied due process and equal protection under the law, when the lower court terminated his parental rights. The relationship between petitioner and his children is Constitutionally protected, *see Troxel vs. Granville, 530 U.S. 57.* The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law". This Court has long recognized that the Fourteenth Amendment's "Due Process Clause" like its Fifth Amendment counterpart guarantees more than fair process. The clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and

liberty interests. The fundamental right, and liberty interest at issue in this matter is petitioner's interest in the companionship, care, nurturing, and upbringing of his children. Petitioner's rights to his children is a fundamental right which is deeply rooted in this Nation's history, and implicit in ordered liberty, see Washington v Glucksberg, 521 U.S. 702; Wolf v McDonnell, 418 U.S. 539. This is the oldest of the fundamental rights recognized by this Court , and the Court of Appeals for the State of New York.

At the time of petitioner's divorce proceedings, which commenced in October 2001, and the termination of petitioner's parental rights on 22 May 2002, petitioner was, and is indigent. Petitioner yearly income, for a family of four, during 2001 was $26,026, see APP-14. This income is only slightly above the Federal Poverty Level for a family of four. According to respondent, petitioner was living on the streets of Rochester, New York in the fall of 2001. At the time the separation agreement was signed, February 2002, petitioner was incarcerated in the Monroe County Jail, with an annual income of $1,856, see APP-14. This income, is substantially below the Federal Poverty Level for a single person. Since petitioner was and is indigent, he had and has a clear statutory right under New York State Statutes to assigned compensated counsel, see Family Court Act § 262 (subd. (a), par.(V)), on any substantial infringements to the custody of his minor children when the lower court terminated petitioner's parental rights. Petitioner's right to assigned counsel as to the issue of any substantial infringement to petitioner's custody in his children is applicable in a divorce action in the NY Supreme Court, because the NY Supreme Court can exercise every power of NY Family Court, see Kagen v Kagen 21 NY.2d 532. New York State statutes provides indigent parents with the right to compensated assigned counsel for custody disputes. Neither the lower court nor this Court can assume that petitioner knew of this right or he has waived this statutory right to assigned compensated counsel unless the lower court first informs him of these rights, which the lower court did not. Petitioner had a fundamental right to have counsel present at all critical stages in the proceedings below, whether it is necessary to preserve

petitioner's right to a fair hearing and/or the right to a meaningful cross-examination, and in this matter petitioner had a right to assigned compensated counsel on the substantial infringement of petitioner's parental rights, see Matter of Alexander, 60 NY.2d 329; United States v Wade, 388 US 218. The combination of the above factors overwhelmed the uncounseled petitioner, and deprived him of the "fundamental fairness" that is guaranteed to petitioner by the Fourteenth Amendment. Also, the concept that the lower trial court can adequately represent the interest of and protect the rights of minor children has been rejected by this Court, see Matter of Gault, 387 US 1; Kent v United States, 383 US 541. From the above, the lower court denied both the petitioner , and the minor children their due process rights and denied each of the parties equal protection of the laws, see Matter Ella B., 30 NY.2d 352; Matter of Lawrence, 29 NY.2d 206; Meyer v Nebraska, 262 US 390; Ginsberg v New York, 390 US 624; Pierce v Society of Sisters, 268 US 510; Board of Education v Barnette, 319 US 624. Thus, since petitioner did not know of his right nor did he waive his right to assigned compensated counsel, the lower court's decree which terminated petitioner's parental rights should be vacated, see Ella, supra; Carnley v Cochran, 369 US 506; Uveges v Pennsylvania, 335 US 437; Menechino v Warden, 27 NY.2d 376; Matter of Bojinoff, 299 NY 145.

The philosophical keystone of child welfare theory within law and practice in New York is the belief that children should grow up with their natural parent, because this is where "the child's need for a normal family life will be best met." The State's first obligation is to help the petitioner with services which would prevent the break-up of the established parent-child relationship, see Matter of Dale P., 84 NY.2d 72; Matter of Michael B., 80 NY.2d 299. The termination of a petitioner's parental rights must be scrutinized and weighted carefully in rendering decisions in such delicate human affairs, see Matter of Orlando F., 40 NY.2d 103. The lower court had an absolute constitutional, and statutory obligation to hold a due process hearing in this matter and was required to make inquires into whether petitioner voluntarily signed the

separation agreement; and the lower court must explain to petitioner the nature of the case, the statutory results of petitioner terminating his parental rights to his children; and all other facts essential to a board understanding of the whole matter, see VanMolke, supra. Also, because of petitioner's indigence, the lower court must explain to petitioner his rights to assigned compensated counsel. Without the above procedural safeguards the termination of petitioner's parental rights would not pass muster in today's legal framework, and would be vacated see Santosky v Kramer 455 U.S. 745; Matter of Sarah K., 66 NY.2d 223; Matter of Jacob, 86 NY.2d 651; Stanley, supra; Matter of JoAnn Bennett, supra; Matter of Raquel Marie X, 76 NY.2d 387; Matter of Ella B., 30 NY.2d 352; Matter of Borkowski, 90 Misc.2d 957. Failure of the lower court to appropriately inform petitioner of his rights and that being indigent entitles petitioner to assigned compensated counsel in regards to the custody infringements, violates petitioner's Fourteenth Amendment rights. Since petitioner was not told by the lower court of his fundamental rights, he was not provided with a "Full and Fair Opportunity" to be heard under the due process clause. The lack of "due process" invalidates the finding of the lower court in regards to the termination of petitioner's parental rights, see Stanley, supra; Matter of Lawrence, supra; Matter of Witenski, supra; the Fourteenth Amendment of the Constitution of the United State; the New York Constitution, Article I §§ 6 and 11; Troxel, supra; Lassiter, supra; Matter of JoAnn Bennett, supra; Matter of Ella B., supra; Von Moltke; supra. Therefore, the petitioner was denied due process and equal protection of the law under the Fourteenth of the United States Constitution, and the New York Constitution, Article I §§ 6 and 11, and the Court must vacate the lower court's decisions.

Petitioner has an eleventh grade education and is trained as a carpenter. Because of petitioner's educational level, and the divorce proceedings in the fall of 2001; and the recognition by the Court, that an indigent parent has most likely had an uncommon difficulty dealing with life and who is involved in a proceeding that thrusts him into a distressing

and disorienting situation, petitioner executed a "Durable Power of Attorney" with his father, Warren R. Follum, Sr., on 23 December 2001, see APP-16. to advice him and help him sort though the legal maze of the upcoming divorce proceeding. Petitioner during these proceedings resided in New York, while petitioner's father resides in North Carolina. Respondent's attorney, Lawrence Baker, was served with the power of attorney on 8 January 2002, and respondent's attorney confirmed its existence to petitioner in a letter, see APP-18, dated 6 February 2002. In this letter respondent's attorney fraudulently misrepresented to petitioner that the "Durable Power of Attorney" that petitioner executed with his father was worthless and further informed petitioner that he, Lawrence Baker, had no intention to comply with petitioner's "Durable Power of Attorney". Respondent's attorney knowingly uttered a falsehood intending to deprive petitioner of his children and property, and petitioner was thereby deceived and damaged. Accordingly, respondent's attorney who fraudulently misrepresented the intent of a "Durable Power of Attorney " for the purpose of inducing petitioner to act or refrain from action in reliance thereon in a legal transaction is liable for the harm caused by petitioner's justifiable reliance upon the misrepresentation, and respondent's actions are sufficient to support a fraud action, see Sabo v Delman, 3 NY.2d 155; Deyo v Hudson, 225 NY 602; Brackett v Griswold, 112 NY 454; Hadcock v Osmer , 153 NY 604.

The purpose of a "Durable Power of Attorney" is to provide a person (agent) the right to protect another person's (principal) rights from unscrupulous individuals, especially unscrupulous attorneys bent on depriving petitioner of his children and property. Respondent's attorney's knew that petitioner had executed a power of attorney with his father to act in his name, place and stead in all his legal matters including the above divorce proceedings, and through respondent's attorney's willful fraudulent actions petitioner was deceived and deprived of his children and property. Under the doctrine of "fraud and unclean hands" the Court should vacate the separation agreement regarding the

termination of petitioner's parental rights , and the property settlement.

The action that underlies this matter was duly brought on by a Summons with Notice for "Action for Divorce", dated 25 October 2001, commenced by respondent Joyce Ann Follum, (a.k.a. Joyce Ann Violante), pursuant Domestic Relation Law § 170(1). The Monroe County Index No.2001 - 11488. On 18 December 2001, petitioner, and respondent's attorney Lawrence Baker, appeared in front of the Supreme Court, Matrimonial Screening Part, Dandrea Rulhmann, Matrimonial Referee. Petitioner stated that he could not afford the services of an attorney. The lower court did not inform the indigent petitioner of his statutory rights to assigned compensated counsel, on any substantial infringement of his custody rights to his children.

On 15 January 2002, the petitioner and the respondent's attorney, Lawrence Baker, appeared in front of the Supreme Court, Matrimonial Screening Part, Dandrea Rulhmann, Matrimonial Referee, and petitioner stated that he would proceed pro se in this matter, because he could not afford an attorney to represent him. Again, the lower court did not inform petitioner that if he was indigent, petitioner was entitled to compensated court appointed counsel on any substantial infringement of petitioner's custody with his minor children. During the above hearing, the matrimonial referee stated that a third hearing would be scheduled to ensure that petitioner voluntarily signed the agreement. A third hearing was scheduled for 31 January 2002. On or about 20 January 2002, petitioner was arrested for trespassing at the parties' home, and incarcerated in the Monroe County Jail. After petitioner was arrested, the lower court removed the 31 January, hearing from its calendar.

Because of petitioner's incarceration, the prison officials and the County of Monroe had a affirmative duty to protect petitioner, because of the "special relationship" imposed on petitioner, which limited his freedom to act on his own behalf, through imprisonment by the County of Monroe, State of New York, see Estelle v Gamble,

429 U.S. 97; Youngberg v Romeo, 457 U.S. 397. This relationship required the State to protect petitioner's rights to due process and equal protection of the law. By the State's actions or lack thereof, petitioner was deprived of his liberty interests in his children, and his property rights.

On 8 February 2002, petitioner who was a indigent prisoner, and who was incarcerated, in the Monroe County Jail, when respondent's attorney, Lawrence Baker, entered the Jail for the sole purpose to deceive, threaten and coerce petitioner into signing the separation agreement. Petitioner did not freely nor did he voluntarily sign the separation agreement. Through respondent's attorney Lawrence Baker's actions, petitioner was denied advice of counsel and advice from his attorney-in-fact. The actions of respondent's attorney, Lawrence Baker, were improper, and unlawful when he entered the Monroe County Jail for the sole purpose of executing a separation agreement with petitioner, without first contacting petitioner's attorney in fact, Warren R. Follum, Sr.; and the States lack of protecting petitioner, who was in essence a ward of the State, denied petitioner due process and equal protection of law when the State did not intervene on petitioner behalf by affording petitioner an attorney to protect petitioner's fundamental and substantial constitutional rights to his children.

On 22 May 2002, Justice Egan executed the "Judgment or Decree of Divorce and Findings of Fact and Conclusions of Law", Justice Egan terminated petitioner's parental rights to his children, without providing petitioner notice or holding a due process hearing to ensure that petitioner had freely and voluntarily executed the separation agreement. Petitioner did not freely nor did he voluntarily sign the separation agreement. Through the lower court's actions, petitioner was denied advice of counsel and advice from his attorney-in-fact. Respondent stated under oath during petitioner's father's grandparent visitation proceedings that respondent knew of petitioner's where abouts from September 2001 to February 2004, because they were in constant contact with each other. In addition to the above, petitioner's father Warren R. Follum Sr.,

was involved in a grandparent visitation dispute with respondent that commenced in December 2001, and ended in June 2006.

In May 2002, just prior to Judge Egan terminating petitioner's parental rights, petitioner's father and respondent represented by Lawrence Baker appeared before Judge Egan regarding the ongoing grandparent visitation dispute. From the above, and the fact that petitioner had executed an power of attorney with his father to act on his behalf in the divorce proceedings the trial court should have provided petitioner with notice of the termination proceedings. There was no reason why either the lower court or respondent attorney could not have provided petitioner with notice of the parental termination proceedings, so that the lower court could make the appropriate inquires, and appropriately inform petitioner of his rights, or the petitioner's father could have intervened on petitioner's behalf during the termination of petitioner's parental rights.

After petitioner was released from the Monroe County Jail in the spring of 2004, for a probation violation regarding the trespassing offense, petitioner, being aggrieved by Judge Egan's terminating his parental rights, petitioner motioned the lower court to reconsider its decision. The above entitled matter, having been duly brought on by a "Order to Show Cause", dated 19 July 2004, with attached affidavit, filed by petitioner, for an order modifying the divorce decree by vacating that portion of the decree that terminated petitioner's parental rights and than awarding him visitation with his children; and modifying the property settlement, such that the couple's property be divided pursuant to the DRL Equitable Distribution Statutes. Respondent Joyce Ann Follum, the children's mother, who opposed the motion; and petitioner having proceeded pro se; and respondent having been represented by counsel; a hearing was held on 27 August 2004, in which petitioner and respondent with her counsel appeared before Justice Ark; and respondent for the first time served petitioner with a copy of the separation agreement and a copy of the executed Divorce Decree, signed by Justice Egan;

and the lower court ordered parties to submit a memorandum of law, see APP-20; and the lower court having heard argument and evidence submitted by the parties, and upon due deliberation thereon, Justice Ark dismissed both petitioner's motion and respondent's cross-motion.

The underlying Order (First Order) in this matter, was signed on 26 October 2004, by the Honorable John J. Ark, Justice of the Supreme Court, and entered in the Monroe County Clerk's office on 28 October 2004, and served upon petitioner, with Notice of Entry on 3 November 2004. Petitioner being aggrieved, appealed the lower court's order to the Appellate Division by filing a "Notice of Appeal", dated 17 November 2004, with Notice of Entry 23 November 2004.

The transcripts from the first hearing, (28th October Order), in this matter have been stipulated to, and the transcripts are deemed correct without further stipulation of the parties or the settlement of the transcripts by the Judge before whom the proceedings were had, pursuant CPLR § 5525. On 19 February 2005, petitioner served respondent with a notice to "Settle the Record on Appeal". On 2 March 2005, respondent served petitioner with her amendments to the "Record on Appeal".

On 10 March 2005, petitioner motioned the lower court to "Settle the Record on Appeal". Respondent's cross-motion was not properly served upon petitioner, and therefore was not properly before the lower court. Respondent's cross-motion has no probative value and it is only intended to inflame and prejudice the lower court against petitioner. Petitioner objected to the inclusion of respondent's cross-motion, because the motion is irrelevant and immaterial to the question of whether petitioner was denied due process and equal protection of the law under the Fourteenth of the United States Constitution, and the New York Constitution, Article I §§ 6 and 11.

On 25 March 2005, oral argument (Second Hearing) to

"Settle the Record on Appeal " , was heard before the Honorable John J. Ark, by telephone conference, Both parties filed memorandums of law with the lower court. Respondent filed hers on 18 March 2005, and petitioner filed his on 28 March 2005. The Order (Second Order) in this action, dated 6 April 2005, was served upon petitioner, with Notice of Entry on 12 April 2005. The Notice of Appeal was filed with the Appellate Court on 18 April 2005 and served on respondent's attorney on 27 April 2005. There were no transcripts to the hearing held on 25 March 2005 therefore there is no stipulation to the transcripts required by the parties.

On 27 April, 2005, petitioner served respondent's attorney the "Record on Appeal", (Second Appeal), for her stipulation that the reproduced "Record on Appeal" consists of the true and complete copies of the "Record on Appeal", and the whole thereof, consisting of the notice of appeal, the order appealed from and all the papers which were used in the Court below, pursuant to CPLR § 5532. The matter of respondent stipulating to the "Record on Appeal" (Second Appeal), was discussed with respondent's attorney on three occasions. The first telephone conversation was with respondent's counsel occurred on or about 17 May 2005; the second telephone conversation occurred on 24 May 2005; and the third telephone conversation occurred on 31 May 2005. During each conversation respondent's counsel stated that she would review the "Record on Appeal", and would respond to petitioner's request for respondent to stipulate to the "Record on Appeal".

On 8 June 2005, the lower court directed petitioner to submit his motion to the lower court to "Settle the Record on Appeal" (Second Appeal), so the lower court could review the motion and calendar the motion to the lower court's motion calendar. On 10 June 2005, the lower court requested additional information from petitioner on the reasons why the lower court should schedule a hearing to "Settle the Record on Appeal". On 14 June 2005, petitioner responded to the lower court's request by stating that the "Record on Appeal" goes to the merits of petitioner's case, and petitioner has a substantial

right to have the record on appeal settled by the lower court, and the lower court was therefore bound to hear petitioner's motion. And petitioner objected to respondent's cross-motion being entered into the lower court's record, because it was not properly served upon petitioner; and respondent's cross-motion has no probative value and it is only intended to inflame and prejudice the lower court against petitioner. And respondent's cross-motion, is irrelevant and immaterial to the question of whether petitioner was denied due process and equal protection of the law under the Fourteenth of the United States Constitution, and the New York Constitution, Article I §§ 6 and 11. On 15 June 2005, the lower court issued a scheduling order setting the motion hearing date for 6 July 2005, and petitioner's motion to "Settle the Record on Appeal", was served by USPS overnight mailer upon respondent on 24 June 2005.

On 17 June 2005, petitioner filed a motion with the Appellate Division in this matter to expand the time for petitioner to "Perfect the Appeal". On 21 June 2005, the Appellate Division requested that petitioner provide proof of service of the above motion papers. On 25 June 2005, petitioner provided proof of service. On 28 June the Appellate Division returned petitioner's motion papers, because he had been granted poor person status on the first appeal CA - 05 - 00056, but not for the present appeal before the Appellate Division, CA - 05 -01785. Petitioner was served the above letter and motion papers on 22 July 2005.

On 28 June 2005, respondent's filed with the lower court her objection to stipulating to the "Record on Appeal". Respondent alleged that petitioner had omitted respondent's affidavit, dated 19 August 2004, from the Record. On 2 July 2005, petitioner filed his reply to respondent's objections to stipulating to the "Record on Appeal". The affidavit which respondent stated that petitioner had omitted from the "Record on Appeal" was actually part of the record, and that respondent's objections were unfounded, On 5 July 2005, respondent's attorney apologized to petitioner for the unfounded weeks of delay that she had subjected petitioner to,

in having the, "Record on Appeal", stipulated to, Respondent stipulated to the "Record on Appeal". On 6 July 2005, oral argument was heard before the lower court by telephone conference. Respondent's attorney apologized to the lower court for the unfounded weeks of delay that she had subjected petitioner to in having the, "Record on Appeal", stipulated to. Respondent conceded to Judge Ark that petitioner's "Record on Appeal" was complete, and included all the necessary papers that were before the lower court . Respondent further stated that she had executed the stipulation for the "Record on Appeal" and served it upon petitioner.

On 26 July 2005, petitioner motioned the Appellate Division to expand the time to perfect the "Record on Appeal", and to proceed as a poor person. CA - 05 - 01785. On 19 August 2005, petitioner motioned the Appellate Division to expand the time to perfect the "Record on Appeal", CA - 05 - 00056. On 13 September 2005, the Appellate Division denied both of petitioner's above motions, thereby dismissing both of petitioner's appeals, because petitioner did not perfect the appeal within the specified time, as ordered by the Appellate Division in its order, dated 31 January 2005.

Petitioner's appeal below was to have the Court of Appeals vacate the termination of petitioner's parental rights and to have the marital property distributed pursuant to the Equitable Distribution Laws of the State of New York. The separation agreement which was merged into the Judgment of Divorce, and Findings of Fact and Conclusion of Law, in Joyce A. Follum (a.k.a. Joyce Ann Violante) vs. Warren R. Follum, Jr., Index No. 2001 / 11488, signed on the 22 May, 2002, by Justice Egan.

Petitioner has perfected the record (2nd Appeal) on a full record, pursuant CPLR Article 55, and has completed the "Record on Appeal" in regards to having the "Record on Appeal" (2nd Appeal) stipulated to by respondent. And he has started on both of his briefs, and the briefs are substantial complete. As shown above, the delay in perfecting the "Record on Appeal" was beyond petitioner's control, and most

of the delay was attributed to respondent refusing to stipulate to the "Record on Appeal" for weeks. Petitioner is convinced and believes that the appeals have a substantial basis and will result in a reversal, because of many errors committed by the lower courts and there is merit to the appeals. The lower courts denied petitioner his substantial fundamental and Constitutional rights to the custody of his children, when it did not provide petitioner with his clear statutory right to compensated assigned counsel on these rights, pursuant Family Court Act § 262 (subd.(a), par.(V)), and the lower court did not hold a due process hearing to determine if petitioner freely and voluntarily signed the separation agreement. Petitioner would be prejudiced and he has and will continue to suffer irreparable harm, if this Court does not review this matter. Hence, it is urged that this Court vacate the trial court order terminating petitioner's parental rights; and remand the case to the lower court for further proceedings.

Petitioner also requests that the Court grant petitioner visitation with Jacob and Alyssa as follows: The children visit with petitioner at his home in North Carolina starting on or about the 26th of June and ending on or about the 11th of July. This visit would combine Jacob's birthday, the Fourth of July holiday and a summertime visits into one visitation. Petitioner would further request that the children visit with him, by petitioner and respondent alternating the Thanksgiving, and Christmas Holidays. This visit would combine the Holiday visits with Alyssa's birthday. The Raleigh area has many Christmas performances that would be beneficial to the children. Also, petitioner would request the children visit with him in the spring in close proximity to Easter. And petitioner be giving unlimited access to the children by mail and phone; and that petitioner be involved in all decisions that affect the children's medical, school and development.

On 19 October 2005, petitioner being aggrieved by the Appellate Court's Orders, dated 13 September 2005, dismissing petitioner's appeal, petitioner prematurely filed an appeal with the Court of Appeals, State of New York, as a right, because of petitioner's substantial and fundamental right to the

companionship, care, nurturing, and upbringing of his children, under the Fourteenth Amendment of the United States Constitution, and the New York Constitution, Article I §§ 6 and 11; and the State can not terminate these rights without due process, and equal protection of the law. In respondent 's previous subject matter jurisdictional statement to the Court of Appeals, she conceded that petitioner was denied a due process hearing prior to the State terminating petitioner's parental rights. The Court of Appeals dismissed petitioner's appeal sua sponte, upon the ground that the order appealed from did not finally determine the action within the meaning of the New York Constitution. The petitioner than motioned the Appellate Division, Fourth Department, to vacate its previous order dismissing petitioner's appeals. The Fourth Department dismissed petitioner's motion. Petitioner than appealed this decision to the Court of Appeals which dismissed petitioner's petition on 11 May 2006. The appellate court's orders have effectively denied petitioner any further appellate review of the lower court's decision, and affirmed the judgments of the Supreme Court of Monroe County.

The parties divorce decree signed by Justice Egan, either conveyed to the respondent, or respondent seized all the parties real and personal martial property. This property included the martial residence, furniture, bank, savings and checking accounts, petitioner's automobile, trade tools, clothing, fishing gear / tackle, and other personal items. The Court should have set aside the parties agreement, because the Court would find it unconscionable, that is, the agreement is such that "no honest or fair spouse would make such an unfair agreement on one hand, and expect her spouse to accept, on other hand an agreement that would shock the conscience and confound the judgment of any spouse of good conscience " see Hume v. United States, 132 U.S. 406, @ 411; Mandel v. Liebman, 303 NY 88; Christain v. Christain, 42 NY.2d 63, @ 71. The New York courts have consistently decided that a separation agreement between a husband and wife must be fair to both parties, because, of the confidential relationship that a husband and a wife shares with each other, they must exercise the utmost good faith in contracting with each other,

even when the marriage is breaking up, see Christian, supra; Simonds v. Simonds, 45 NY.2d 233. Therefore, this Court should set aside the parties separation agreement, because the Court would find that the agreement is unconscionable, and respondent overreached when respondent's attorney drafted said agreement, and deceived, threatened and coerced petitioner to agree to the agreement's extremely unfair terms and conditions.

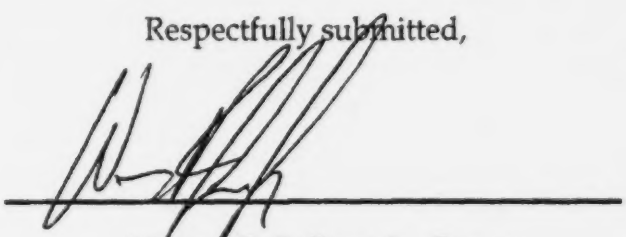
In conclusion the trial court denied petitioner due process and equal protection of the law under the clauses of the Fourteenth Amendment of the Constitution of the United States, and the New York Constitution, Article I §§ 6 and 11, when the lower court did not hold a due process hearing prior to terminating petitioner's parental rights to his children; and the lower court further denied petitioner his Constitutional rights when the lower court did not inform petitioner of his statutory right to assigned compensated counsel on the substantial infringement of his parental rights, because of his indigence; and the Appellant Division further denied his rights to a "Full and Fair Opportunity" to be heard on this matter when the court denied petitioner's motion to expand the time to perfect the appeal. The New York court's have determined that extraordinary facts and circumstance must exist prior to the lower courts taken the drastic step of terminating a person's parental rights. This Court would find it repugnant for a lower court to terminate petitioner's parental rights without holding a due process hearing; and there must be clear and convincing evidence that such a drastic decision was warranted; and the termination of petitioner's parental rights were in the best interests of the children. All petitioner is requesting is an opportunity to a "Full and Fair Opportunity" to be heard prior to the State making any decision on whether petitioner's parental rights to his children should to be terminated. The Court should vacate the termination of petitioner's parental rights, and remand the case for further proceedings. In the interest of justice, the Court should also grant petitioner temporary visitation with his children while the lower courts sorts through this matter.

CONCLUSION

For all the foregoing reasons, petitioner Warren R. Follum, Jr., respectfully prays that a Writ of Certiorari be issued to review the decision of the New York Court of Appeals denying further appellate review of the judgment and opinion below; and, remand this matter to the lower courts of the State of New York, so that petitioner can have a full and fair hearing on the merits. Which the lower court will ultimately, issue a new order vacating the termination of petitioner's parental rights, and the parties property settlement; and grant petitioner visitation with his children, and grant petitioner permission to proceed as a poor person before the lower courts, and assign, Mr. Brain Barney, Esq., (585 - 248 - 0140) as compensated counsel to assist petitioner in any proceedings which involve the termination of his parental rights; and for such other relief as is fair and just in the circumstances of this case.

Dated: 27 July 2006

Respectfully submitted,



Warren R. Follum, Jr., Pro se
P.O. Box 5774
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919 - 522 - 5689

COURT OF APPEALS OF NEW YORK

MOTION NO. 533 SSD 41

WARREN R. FOLLUM JR., *Appellant*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

2006 N.Y., LEXIS 1360

11 May 2006, Decided

NOTICE THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Follum v. Follum, 20 AD.3d 886, 797 NYS.2d 331, (N.Y. App. Div. 4th Dept., 2005).
Case noted is incorrect, WRF,Jr.

OPINION: Appeal dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

PRESENT: Hon. Judith S. Kaye, Chief Judge presiding.

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION,
FOURTH DEPARTMENT

CA 05 - 00056 and
CA 05-01785

WARREN R. FOLLUM JR., *Appellant*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

Entered 22 February 2006

PRESENT: Pigot, Jr., P.J., Hurlbutt, Scudder, Kehoe, and Gorski, JJ.

Appellate having moved to vacate the dismissal of the appeals taken herein from orders of the Supreme Court entered in the Office of the Clerk of the County of Monroe on October 28, 2004, and April 7, 2005, and for other relief.

Now, upon reading and filing the affidavit of Warren Follum, Jr., sworn to January 4, 2006, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

JoAnn M. Wahl, Clerk

SUPREME COURT
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester N.Y.

I, JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

SEAL of the SUPREME
COURT APPELLATE
DIVISION -
FOURTH DEPARMENT

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the City of Rochester, New York, this Feb. 22, 2006.

" s/ JoAnn M. Wahl

Clerk

COURT OF APPEALS OF NEW YORK

MOTION NO. 1270 SSD 71

WARREN R. FOLLUM JR., *Appellant*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

6 NY.3d 750
2005 N.Y., LEXIS 3424

20 December 2005, Decided

NOTICE THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Follum v. Follum, 20 AD.3d 886, 797 NYS.2d 331, (N.Y. App. Div. 4th Dept., 2005).
Case noted is incorrect, WRF,Jr.

OPINION: Appeal dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

PRESENT: Hon. Judith S. Kaye, Chief Judge presiding.

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION,
FOURTH DEPARTMENT

CA 05 - 00056 and
CA 05-01785

WARREN R. FOLLUM JR., *Appellant*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

Entered 13 September 2005

PRESENT: Pigot, Jr., P.J., Hurlbutt, Kehoe, Gorski, and Pine, JJ.

Appellate having moved for an extension of time to perfect the appeals taken from orders of the Supreme Court entered in the Office of the Clerk of the County of Monroe on October 28, 2004, and April 7, 2005, and for other relief.

Now, upon reading and filing the affidavit of Warren Follum, Jr., sworn to July 26, 2005, and August 20, 2005,the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

JoAnn M. Wahl, Clerk

SUPREME COURT
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester N.Y.

I, JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

SEAL of the SUPREME COURT APPELLATE DIVISION - FOURTH DEPARMENT

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the City of Rochester, New York, this Sept. 13, 2005.

" s/ JoAnn M. Wahl

Clerk

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

DECISION AND ORDER
INDEX NO. 2004 - 04103

WARREN R. FOLLUM JR., *Petitioner*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE JOHN J. ARK
SUPREME COURT JUSTICE

Base on his claim that the Court abruptly and without due process or equal protection of law terminated his parental rights and division of marital property, petitioner seeks to modify, amend and vacate certain paragraphs of the "Final Judgment or Decree of Divorce and Findings of Fact and Conclusion of Law" signed by Supreme Court Justice David Egan on May 22, 2002. Petitioner also requests reliefs which are dependent upon the "Judgment or Decree of Divorce" being modified, amended or vacated.

Petitioner first contends that the judgment should be vacated in part because he was deprived of counsel. Not only did he not submit evidence to support these allegations, but the record appears otherwise. Petitioner was served with divorce papers. The matter was assigned to Justice Egan and petitioner made a number of appearances in the case. The Court provided petitioner several opportunities to obtain an attorney. Indeed, despite his present claim that he was then indigent, the transcript reflects that petitioner's adjusted gross income had been over $50,000,(comment by WRF, Jr., income allegation was made by respondent's attorney Lawrence Baker, who submitted no evidence to support his allegations).

Petitioner also stated to the Court that he knew he did not qualify for assigned counsel, (comment by WRF,Jr., petitioner is not qualified to know whether he qualified for assigned counsel). Although there may have been the necessary of assigned counsel had the case not been transferred from Family Court, there is no constitutional or statutory right or entitlement which required the Supreme Court trial justice to assign free legal counsel in this Supreme Court matter (McGee v McGee, 180 Misc.2d 575 _ {Sup. Ct. Suffolk County., 1999]). (comment by WRF,Jr., the McGee matter is not on point, because it is a custody proceeding were one parent will have physical custody and the other will have visitation. The case at bar involves a termination of petitioner's parental rights).

Petitioner further claims that he was under duress when he signed the Separation Agreement. However, he provides no facts which would support his assertion. His mere incarceration for incidents of domestic violence, (comment by WRF, Jr., incarceration was for a telephone call to respondent, and trespassing at parties' home), and a visit by his wife's then attorney do not equate to coercion. Indeed, the Findings of fact and Conclusion of law entered in the divorce case specifically stated that petitioner had agreed to the terms of the Separation Agreement on the record prior to his incarceration , (comment by WRF, Jr., petitioner agreed to a separate set of terms and conditions than what was presented to petitioner by respondent's attorney when he was incarcerated), and that he and the Court requested that his wife's attorney prepare the Separation Agreement in which he agreed that his parental rights be terminated in front of a deputy and that he did so freely and voluntarily under no threats, duress or coercion. This entire lack of coercion is further evidenced at a later date, when petitioner, in response to a letter from his wife's former attorney, signed and sent in a stipulation permitting the divorce matter to proceed by default.

The Findings of Fact, Conclusion of law and Judgment of Divorce constitute res adjudicata, or law of the case, and cannot be collaterally challenged by the process petitioner has selected (Cook v. Cook, 260 AD2d 160 [1st Dept. 1999]; Dominguez v. Dominguez, 255 AD2d 121 [1st Dept. 1998]), (comment by WRF,Jr., both of the cases noted are not on point, because both litigants had appearances before the trial court and nether were indigent, and petitioner commenced this action once he became aware of the terms and conditions within the separation agreement). Petitioner's remedy was to appeal the non stipulated portions of Justice Egan's decision(see, Hines v Hines, 125 AD2d 946 [4th Dept., 1986]), (comment by WRF, Jr., this case is not on point, because the litigants had a trial at which they could appear to contest the stipulation, petitioner was given no such opportunity).

Accordingly, the Court denies all of petitioner's requested relief and dismisses his application in its entirety. With the exception of said dismissal of the petition, the cross-motion is also dismissed in its entirety.

This is the Decision and Order of the Court.

DATED: October 26, 2004

"s/ John J. Ark"

HON. John J. ARK
SUPREME COURT JUSTICE

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

DECISION AND ORDER
INDEX NO. 2004 - 04103

WARREN R. FOLLUM JR., *Petitioner*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE JOHN J. ARK
SUPREME COURT JUSTICE

The motion of Warren R. Follum, Jr., to settle the Record on Appeal, joined by Joyce Ann Follum, was heard by means of a conference call on March 25, 2005. Mr. Follum, who resides in North Carolina, had requested the conference, in lieu of a lengthy and costly trip to Rochester for oral argument.

Mr. Follum relies on his pro se status to excuse any formal irregularities in his papers. While the Court has expended every effort to extract his intended meaning, official court rules must nonetheless be applied to his submissions.

Mr. Follum seeks to exclude from the Record on Appeal his former wifes responding papers, cross-motion and memorandum of law. He further argues for inclusion of his own memorandum of law. Ms Follum opposes exclusion of her cross-motion, supporting affidavits and exhibits. She also opposes inclusion of either party's memorandum of law, and rejects certain items proffered by Mr. Follum, as not having been before this Court at Special Term, and not having had any bearing on the Order appealed from, dated October 26, 2004.

Mr. Follum alleges untimely service of Ms Follum's

cross-motion. Therefore, he asserts, the Court must not consider the offending submissions.

Mr. Follum preserved no objection to the alleged late service of Ms Follum's papers and, while he now claims prejudice stemming from inadequate time to prepare rebuttal, did not request any extension of time to respond, (comment by WRF,Jr., see point III page APP - 27 of petitioner's memorandum of law objecting to inclusion of respondent's cross-motion). Ms Follum's papers were before the court at the time of oral argument, and were relied upon in formulating its decision. Accordingly, they must be included in the Record on Appeal.

In a letter to Mr. Follum, dated March 2, 2005, Ms Follum's attorney objected to inclusion of twelve items in the Record on Appeal, comprising pages thirty-four through and including one hundred eighty-eight.

Upon examination of the proposed Record on Appeal, it is the Decision of this Court that pages thirty-four through and including seventy-six, and one hundred two through and including one hundred eighty-six, be deleted from said Record.

The Court further determines that Ms Follum's Notice of Cross-Motion, dated August 20,2004, her and her attorney's Affidavits (both sworn to on August 19, 2004) with Exhibits must be added to the Record on appeal.

Neither party's memorandum of law will be included in the Record on Appeal, and Warren R. Follum, Jr., shall, in furtherance of this Decision, make corrections to the Table of Contents and the CPLR § 5531 Statement, pursuant to the requests in Ms Follum's attorney's letter of March 2, 2005.

Finally, Mr. Follum is directed to draft a new Statement Pursuant to CPLR §§ 5532 and 5525, for

signature by him and Ms. Follum's attorney

All of the above is SO ORDERED.

DATED: April 6, 2005

"s/ John J. Ark"

HON. John J. ARK
SUPREME COURT JUSTICE

YOUR SOCIAL SECURITY STATEMENT

SEAL OF THE SOCIAL SECURITY ADMINISTRATION USA

Prepared especially for
Warren R. Follum, Jr.

WARREN R. FOLLUM, JR.
P.O. BOX 5774
RALEIGH, NC 27650-5774

Help Us Keep Your Earnings Record Accurate

You, your employer and social security share a responsibility for the accuracy of your earnings record. Since you b\egan working, we recorded your reported earnings under your name and Social Security number. We have updated your record each time your employer (or you, if you're self-employed) reported your earnings. Remember, it's your earnings, not the amount of taxes you paid or the number or the number of credits you're earned, that determine your benefit amount. When we figure that amount, we base it on your average earnings over your lifetime. If our records are wrong, you may not receive all the benefits to which you are entitled.

- **Review this chart carefully** using your own records to make sure our information is correct and that we've recorded each year you worked. You're the only person who can look at the earnings chart and know whether it is complete and correct.
  Some or all of your earnings from **last year** may not be shown on your *Statement*. It could be that we still were processing last year's earnings reports when your *Statement* was prepared. Your complete earnings for last year will be shown on next year's *Statement*. **Note:** If you worked for more than one employer during any year, or if you had both earnings and self-employment income, we combined your earnings for the year.

- **There's a limit on the amount of earnings on which you**

pay Social Security taxes each year. The limit increases yearly. Earnings above the limit will not appear on your earnings chart as Social Security earnings. (For Medicare taxes, the maximum earnings amount began rising in 1991. Since 1994, **all** of your earnings are taxed for Medicare.)

- **Call us right away** at **1-800-722-1213** (7 a.m.-7 p.m. your local time) if any earnings for years **before last year** are shown incorrectly. If possible, have your W-2 or tax return for those years available. (If you life outside the U.S., follow the directions at the bottom of Page 4.)

Your Earnings Record at a Glance

Years You Worked	Your Taxed Social Security Earnings	Your Taxed Medicare Earnings
1985	$ 2,654	$ 2,654
1986	$ 3,763	$ 3,763
1987	$ 8,569	$ 8,569
1988	$17,009	$17,009
1989	$11,337	$11,337
1990	$13,248	$13,248
1991	$11,701	$11,701
1992	$ 2,189	$ 2,189
1993	$ 5,777	$ 5,777
1994	$ 3,759	$ 3,759
1995	$17,387	$17,387
1996	$16,930	$16,930
1997	$35,059	$35,059
1998	$47,110	$47,110
1999	$46,059	$46,059
2000	$43,025	$43,025
2001	**$26,026**	**$26,026**
2002	**$ 1,856**	**$ 1,856**
2003	**$ 6,185**	**$ 6,185**
2004	**$ 3,718**	**$ 3,718**

Did you know....Social Security is more than just a retirement program? It's here to help you when you need it most.

You and your family may be eligible for valuable benefits:

- When you die, your family may be eligible to receive survivors benefits.
- Social Security may help you if you become disabled --- even at a young age.
- It is possible for a young person who has worked and paid Social Security taxes in as few as two years to become eligible for disability benefits.

Social Security credits you earn move with you from job to job throughout your career.

Total Social Security and Medicare taxes paid over your working career through the last year reported on the chart above:

Estimated taxes paid for Social Security:		Estimated taxes paid for Medicare:	
You paid:	$19,924	You paid:	$4,675
Your employers paid:	$19,924	Your employers paid:	$4,675

Note: You currently pay 6.2 percent of your salary, up to $90,000, in Social Security taxes and 1.45% in Medicare taxes on your entire salary. Your employer also pays 6.2 percent of your salary, up to $90,000, in Social Security taxes and 1.45% in Medicare taxes for you. If you are self-employed, you pay the combined employee and employer amount of 12.4 percent in Social Security taxes and 2.9 percent in Medicare taxes on your net earnings.

DURABLE GENERAL POWER OF ATTORNEY

THE POWERS YOU GRANT BELOW CONTINUE TO BE EFFECTIVE SHOULD YOU BECOME DISABLED OR INCOMPETENT

THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS.

KNOW ALL, MEN BY THESE PRESENTS, this is intended to constitute a **DURABLE GENERAL POWER OF ATTORNEY** pursuant to Article 5, Title 15 of the New York General Obligations Law:

I, Warren Richard Follum Jr., (hereinafter myself), 4997 Creek Road, Lewiston New York 14092, do hereby appoint:

Warren Richard Follum Sr., (hereinafter my father), P.O. Box 5774, Raleigh, North Carolina 27650, my attorney-in-fact **TO ACT IN MY NAME AND STEAD** in any way which I myself could do, if I were personally present, with respect to the matrimonial matter, Joyce Ann Follum v. Warren Richard Follum Jr., Index no. 2001 / 11488. Pursuant General Obligations Laws, Claims and Litigation, **Warren R. Follum Sr.,** shall negotiate all separation agreements between myself and Joyce Ann Follum, as I am an indigent person and I am incapable of adequately defending my rights in the above matter and the Court will not appoint counsel to defend my rights in this matter.

I hereby agree to indemnify and hold harmless any third party from and against any and all claims that my arise against such third party having relied on the provisions of this instrument.

THIS DURABLE GENERAL POWER OF ATTORNEY MAY BE REVOKED BY ME

In Witness Whereof I hereunto signed my name this
23rd day of December , 2001

" s/ Warren R. Follum, Jr."
Warren R. Follum Jr.

Witnessed this 23rd day of December , 2001

" s/ Warren R. Follum, Sr."
Warren R. Follum, Sr.

Lawrence Baker
ATTORNEY AND COUNSEL AT LAW

February 6, 2002

Warren R. Follum, Jr.

RE: Follum v. Follum Jr.

Dear Mr. Follum:

Enclosed herewith, please find the Separation Agreement which I have **drafted pursuant to your wife's comments** to me regarding the discussions you and her have continuously communicated about concerning specific issues. There are no curveballs in this Agreement. It is straight forward and concise. Should you have any questions, since you are **pro se**, you may call me to discuss any issues you are unsure.

I have contracted the court and informed them of the Separation Agreement. If we can not come to a quick signing of the Agreement, you may want to move forward with this matter and place this action down for trial. Of course, I do not believe that it would be in your best interests to go with this route, since information would be divulged that really is not necessary at this time.

It is my understanding, that your father has requested you sign a power of attorney. For what reason, I have no idea, because even if you signed a power of attorney, it isn't worth the paper it is written on. Please be advised, that a spouse in a matrimonial pending action can never sign, transfer, assign, or sell their interest away in any property whether it be separate or marital until there has been an executed Agreement or a disposition by the court. Therefore, if your father thinks that by signing a power attorney he now has the ability to negotiate or stand in your place is absolutely ridiculous and absurd. If that would be the case, in every divorce action one would sign away their rights and there

would be total chaos. You shall remain liable for everything you do until a final disposition.

Again, should you have any questions please contact me. This Agreement must be executed by both parties or the **court has ordered you to be transported to Supreme Court as soon as possible.**

Very truly yours,

"s/ Larry Baker"

Lawrence Baker
LB/dns
<enclosure>
CC: Joyce Follum

480 Ridge Road West Rochester New York 14615
Tel. (716) 691 - 1080; Fax (716) 691 - 8501

STATE OF NEW YORK
SUPREME COURT - COUNTY OF MONROE

WARREN RICHARD FOLLUM, JR. Petitioner -	
V	
	Index No. 2004 / 04103
JOYCE ANN FOLLUM a.k.a., JOYCE ANN VIOLANTE	Honorable John J. Ark
Respondent -	Supreme Court Justice

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF VACATING ARTICLES II, V, VI and XV OF THE PARTIES SEPARATION AGREEMENT

1. This Memorandum of Law is submitted by the petitioner Warren Richard Follum, Jr., in support of the petitioner's request for the Court to vacate Articles II, V, VI and XV of the parties Separation Agreement which was merged into the Judgment of Divorce; and Findings of Fact and Conclusion of Law, in Joyce A. Follum (a.k.a. Joyce Ann Violante) vs. Warren R. Follum, Jr., Index No. 2001 / 11488, signed on the 22nd day of May, 2002, by the Honorable David D. Egan, Justice of the Supreme Court. It is undisputed by the parties involved in this matter that the petitioner at the time of executing the Separation Agreement was an indigent prisoner duly incarcerated in the Monroe County Jail and pursuant to Family Court Act § 262 (subd.(a), par.(V)) has a statutory right to Court appointed assigned counsel on the infringements of all custody issues which were part of the divorce proceedings.

FACTUAL BACKGROUND

1. It is undisputed by the parties involved in this matter that the petitioner Warren Richard Follum, Jr., was an

indigent prisoner, with no income or assets, who was duly incarcerated in the Monroe County Jail at the time the Separation Agreement was executed. Prior to his incarceration on the 17th day of January 2002, the Court held two hearings on the matter of the divorce. The first was held on 18 December 2001 and second was held on 15 January 2002, before the Matrimonial Referee Dandrea L. Ruhlmann, and a third hearing was scheduled for the 31st of January 2002. The third hearing was removed from the Court's calendar because the petitioner was incarcerated.

2. During the first hearing, the petitioner explained to the Court that he intended to be represented by counsel, but has unemployed and had no money or assets to pay for an attorney. The petitioner is a carpenter. He further explained to the Court that the respondent (Ms Violante) had all his tools and he could not return to work without his tools. At the same hearing, the respondent's lawyer, Mr. Baker, explained to the Court that the respondent was seeking custody of both children. Ms Ruhlmann explained to petitioner, that he has a right to obtain counsel, but did not explain that if he is indigent he has a right to assigned counsel. Nor did she explain the legal issues and consequences of the custody action brought on by Ms Violante.

3. During the second hearing, the petitioner agreed to proceed Pro se. Again Ms Ruhlmann explains that the petitioner has a right to obtain counsel, but she did not explain that he has a right to assigned counsel on the custody issues. Ms Ruhlmann than instructs the parties that they are to come to agreement on the divorce issues and that there will be a third and final conference with the parties at which time they will enter into a agreement. Ms Ruhlmann further stated that at the third hearing, the Court will inquire into whether or not the parties voluntarily entered into the Separation Agreement. Ms Ruhlmann than stated

that she was putting the matter down for short turnaround, because Ms Violante has been patient and her legal costs have been substantial and that Ms Ruhlmann will be sensitive to the Ms Violante's needs and give the divorce matter a short turnaround.

4. On the 23rd of December 2001, the petitioner executed a "Power of Attorney" with Mr. Follum, Sr., to act as his agent to negotiate a settlement on the divorce proceedings. Mr. Follum, Sr., discussed and served the respondent's attorney , Mr. Baker, with a copy of the executed agreement at Mr. Follum, Sr., grandparent visitation hearing on 8 January 2002, before the Honorable David D. Egan.

5. From the hearing on the 8th of January 2002 and continuing to the present the petitioner's father Warren R. Follum, Sr., has been in litigation appearing Pro se with the respondent regarding a Grandparent's Visitation petition pursuant DRL § 72. All the hearings concerning the petitioner's divorce and Mr. Follum, Sr., grandparent visitation matter has been held before the Honorable David D. Egan. Judge Egan has rendered three decisions regarding the grandparent's visitation petition and all three have been appealed to the Appellate Division, Fourth Department, of which two of Judge Egan's decisions have been unanimously reversed on the Law. The third is presently pending before the Appellate Division. This third appeal is the one referred to in the respondent's papers now before this Court. Since, the decision of the lower Court is not final, this Court has to ignore the lower Court's Findings of Fact and Conclusion of Law. We expect the lower Court's decision will be unanimously reversed on the law and the facts by the Appellate Division, because of the numerous errors made at trial and the facts of the case.

6. During the petitioner's incarceration, the respondent's lawyer, Mr. Baker, visited the petitioner in jail

on 8th February 2002, to have the petitioner sign the separation agreement, which the petitioner did after Mr Baker informed the petitioner that Ms. Violante would drop the charges and post his bail. At the time of the execution of the Separation Agreement the petitioner was denied advice of counsel and the advice of Warren R. Follum, Sr., who is the petitioner's attorney-of -fact to act on the petitioner's behalf in the "Action of Divorce". The petitioner did not understand the terms and conditions of the Separation Agreement nor did he understand the legal ramifications of signing said agreement. The petitioner signed the Separation Agreement under duress and threats of coercion, it was not signed freely nor voluntarily by the petitioner. Mr. Baker in a letter to the petitioner stated that he knew that Mr. Follum, Sr., had "Power of Attorney" over negotiating a settlement on the petitioner's pending divorce, but Mr. Baker indicated that he had no intentions of abiding by this "Power of Attorney".

7. On the 22nd day of May 2002, the Honorable David D. Egan signed the divorce Decree that terminated the petitioner's parental rights to his children Jacob and Alyssa, without providing the petitioner with notice or holding a hearing to determine whether or not the petitioner voluntarily executed the "Separation Agreement" that terminated the petitioner's parental rights.

ARGUMENT

POINT I
INDEGENT PARENT'S RIGHTS TO ASSIGNED COUNSEL

1. As your Honor knows, the New York State Legislature enacted § 262 (subd. (a), par.(V) of the Family Court Act, requiring the Courts to assign compensated counsel to an indigent parent when a substantial infringement of his rights to custody of his children is pending. The Supreme

Court of New York may exercise every power of the Family Court. see Kagen vs. Kagen 21 NY.2d 532. Under section 262, the Family Court is required to assign compensated counsel to an indigent parent seeking or contesting substantial infringement of his right to custody. see Brokowski vs. Brokowski, 90 Misc.2d 956. The petitioner's right to assigned counsel as to the issue of custody is applicable in a divorce action in Supreme Court which may exercise every power of the Family Court. see Kagen, supra; Brokowski, supra.

2. A parent has made a "Prima Facia" case of being indigent if he is incarcerated in jail with no income, see Brokowski vs. Brokowski, 90 Misc.2d 956; or if the parent has no real assets, see Smith vs. Smith 2 NY.2d 120; or if the parent is on public assistance, see Emerson vs. Emerson 33 AD.2d 1022.

3. As your Honor further knows, the Supreme Court of the United States has recognized on numerous occasions that the relationship between a parent and his child is Constitutionally protected. See Troxel vs. Granville, 530 U.S. 57. The 14th Amendment provides that no State shall "deprive any person of life, liberty, or property without due process of law". The Supreme Court of the United States has long recognized that the 14th Amendment's "Due Process Clause" like its 5th Amendment counterpart guarantees more than fair process. The clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. The liberty interest at issue in this matter is a parent's interest in the companionship, care, nurturing, and upbringing of one's children. This is the oldest of the fundamental liberty interests recognized by the Supreme Court of the United States and the Court of Appeals for the State of New York, see Troxel, supra.

4. The decisions of the Supreme Court of the United

States have made it abundantly clear to the lower courts that a parent's liberty interests in one's children is an important interest that warrants special protection by the Courts. When the State uses its police powers to terminate a parent's rights to his children the State works a unique kind of deprivation and a parent's interest in the accuracy and justice of the decision to terminate the parent's rights to his children is therefore a commanding one. Which requires that the Court must give consideration that the parent not be erroneously deprived of his children and the Courts have also held, because of a parent's fundamental rights to his children the State must appoint counsel for a indigent parent faced with termination of his parental rights. Because a indigent parent is most likely to be a person with little education, who has had uncommon difficulty dealing with life and who is involved in a proceeding that thrusts him into a distressing and disorienting situation. See Lassiter vs D.S.S. Durham County, NC, 452 US 18; Stanley vs. Illinois, 405 U.S. 645. The Lassiter Court addressed that New York State provides indigent parents with compensated assigned counsel for custody disputes. The combination of these factors overwhelms an uncounseled parent and deprives him of the "fundamental fairness" that is guaranteed to the parent by the 14th Amendment.

5. In all of this troublesome and troubled area of child custody there is a fundamental principle. Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from the child's parent unless the parent is provided with "Due Process and Equal Protection of the Law". Nether lawyers, nor judges in the judicial system nor experts in psychology or social welfare may displace the primary responsibility of child-raising that naturally and legally falls to a natural parent. Again this is not so much as a parent's responsibility, but because it is a fundamental right guaranteed to each natural parent by the

14th Amendment. See Stanley, supra; Matter of JoAnne Bennett 40 NY.2d 543.

6. Therefore, Constitutional Law requires that a indigent parent faced with the loss of a child's companionship is entitled to an opportunity for a hearing and assistance of counsel, with assigned counsel if the parent lacks the means to retain a attorney. And if the indigent parent has a right to be represented by assigned counsel, it follows that the party entitled to assigned counsel be so advised. If the party before the Court is not apprised of his right to assigned counsel, there would be no assurance either that he knew he had such a right or that he had waived it. If the Courts do not follow these basic tenets of Constitutional Law the parent's Constitutional rights have been violated under the "Due Process and Equal Protection of the Law Clauses" of the 14th Amendment. See Matter of Ella B. 30 NY.2d 352.

7. Because of the above basic principles of Constitutional Law, the State has a heavy burden to show that an indigent person waived his rights to counsel. To be valid the Supreme Court of the United States declared in the "Von Moltke" case (332 US 708, 724) that the Court must explain the nature of the case, the statutory results of the termination of one's parental rights at issue in this matter, and all other facts essential to a board understanding of the whole matter. And the Court must explain an indigent parent's rights to assigned counsel. Failure of the Court to appropriately inform a person of his rights and that an indigent parent is entitled to assigned counsel in regards to the custody infringements, violates the parent's 14th Amendment rights. The individual who is not told by the Courts of these fundamental rights is not being provided with a "Full and Fair Opportunity" to be heard under the "Due Process Clause". The lack of "Due Process" invalidates the finding of the Court. see Stanley vs. Illinois 405 U.S. 645;

Matter of Lawrence 29 NY.2d 206; N.Y. vs. Witenski 15 NY.2d 392.

8. The Courts have an obligation, duty and statutory requirement to inform indigent parents of their rights to assigned counsel on any substantial infringement of a indigent parent's custody rights to his children. The petitioner was never informed of his rights during either the hearing on the 18 December 2001 nor during the hearing on the 15th January 2002, to have assigned counsel on the custody issues nor was he apprised of the statutory consequences of a person who terminates his parental rights. Nor did the Court give the petitioner notice of a final hearing nor did the Court hold a final hearing to inquire into whether or not the petitioner voluntarily agreed to the termination of his parental rights. The Court violated the petitioner fundamental liberty interests in his children and his fundamental rights to "Due Process and Equal Protection under the Law", under the 14th Amendment of the U.S. Constitution . Therefore, since the Court violated the petitioner's "Due Process Rights" the Court's actions and findings regarding terminating the petitioner's parental rights are therefore invalid and this Court must strike and vacate Article V, TERMINATION OF PARENTAL RIGHTS AND OBLIGATIONS from the separation agreement and determine reasonable and fair visitation for the petitioner with his children.

POINT II
POWER OF ATTORNEY OVER PROPERTY INTERESTS

1. The petitioner had executed a "Power of Attorney" with Warren R. Follum, Sr., on the 23rd day of December 2001. This "Power of Attorney" was for the petitioner agent (Mr. Follum, Sr.) to negotiate a settlement in the pending divorce between the petitioner and the respondent. The General Obligation Laws allow an agent such as Mr. Follum, Sr., to

settle, and to propose or to accept a compromise with respect to, any litigation to which the principal is a designated party. The statute does not limit the type of litigation nor are divorce proceedings specifically barred under the statute from a agent such as Mr. Follum, Sr., to negotiate a property settlement in a marital litigation.

2. The respondent's attorney, Mr. Baker, acknowledged in a letter dated 6 February 2002, that the petitioner and Mr. Follum, Sr., had entered into a "Power of Attorney" regarding the property settlement for the pending divorce between the petitioner and the respondent. Mr. Baker further indicated that he had no intentions of honoring the "Power of Attorney" that the petitioner and Mr. Follum, Sr., had executed. Therefore, since the respondent fraudulently obtained the property settlement from the petitioner the Court must strike and vacate the Articles within the Separation Agreement pertaining to the transfer of personal and real property.

POINT III
DISMISS RESPONDENT'S CROSS-MOTION

1. The respondent did not properly serve her cross-motion on the petitioner. The respondent's attorney Ms Clemens admitted in open Court that she served the cross-motion on the petitioner using a pre-paid first class United States Postal mailer and that she mailed it to the petitioner on the 20th day of August 2004. Section 2103(b)(2), of the CPLR, requires the respondent when mailing any papers by United Postal Service first class mail to mail the Cross-Motion to the petitioner no later than eight days (3 days + 5 days) before the return date of the original motion. See Perez vs. Perez, 131 AD.2d 451. This would have required that the Cross-Motion be mailed to the petitioner no later than the 19th day of August 2004. Therefore, the court must dismiss the respondent's Cross-Motion for the reasons discussed

above and for improper service of the respondent's motion.

POINT IV
AWARD OF COSTS

1. The petitioner as of this date has not received the respondent's cross-motion, but the respondent's attorney did allow the petitioner to briefly review the respondent's voluminous motion before trial on the 27th. Any award of counsel fees and especially the award of punitive damages in any amount let alone the respondent's request for $50,000 under the circumstances of the case at bar would be totally absurd. The petitioner is an indigent litigant ,who is unemployed with no money or assets, and is attempting to rectify a grievous injustice done to him, when the Court abruptly and without a "Due Process Notice" terminated the petitioner's parental rights to his children. The respondent on the other hand has real estate that she rents and is employed. The respondent's common-law husband is employed at Eastman Kodak Company and earns between $60,000 and $70,000 per year. They own a house separate from the rental property noted above and own at least two vehicles and have money in the bank. Under these circumstances it would be inappropriate for the Court to award the respondent costs especially when the petitioner is not requesting costs on his behalf.

CONCLUSIONS

For the reasons discussed above and based upon the facts of this case this Court should find: (1). That the Court has to strike and vacate Article V, TERMINATION OF PARENTAL RIGHTS AND OBLIGATIONS from the separation agreement and determine reasonable and fair visitation for the petitioner with his children. (2). That the Court has strike the real and personal property transfer agreement from the separation agreement. (3). That the Court has to dismiss the respondent's Cross-Motion for the

reasons discussed above and because the motion was not properly served upon the petitioner. (4). That the Court has to deny the respondent's request for costs and her absurd request for punitive damages. (5). That the Court has to order the parties to negotiate a visitation schedule, a support payments agreement for the children and agree upon a appropriate property settlement agreement.

Respectfully submitted, this 28th day of August 2004.

Yours, etc.

"s/ Warren R. Follum, Jr."

Warren R. Follum, Jr., Pro Se
PO Box 5774
Raleigh, North Carolina 27650
919-522-5689

TO:
Margaret A. Clemens, Esq.